Internal Revenue Service
SB/SE, Compliance
BIRSC, SS-8 Unit

Department of the Treasury
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Release # SS8 2010020004
Release Date: 2-18-10
Index (UIL) No.: 3121.04-01
Third Party Communication: None

October 26, 2009

Form: SS-8

Person to Contact:

Telephone Number

Fax Number

Refer Reply to: Case # 67219

Dear Taxpayer:

The purpose of this letter is to respond to a request for a determination of employment status, for Federal employment tax purposes, concerning the work relationship between , referred to as "the firm" in the rest of this letter, and , referred to as "the worker" in the rest of this letter. It has come to our attention that the services were performed in 2006.

DETERMINATION RESULT

We hold the worker to have been an employee of the firm. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

DESCRIPTION OF WORK RELATIONSHIP

The firm is a multi member limited liability company (LLC) providing drilling service to their customers. The worker was engaged to provide his services as a driller/general manager. His duties consisted of but not limited to providing drilling when needed, making phone calls to contacts and maintaining the firm's equipment.

The firm provided training and instructions on how to use the drill equipment as well as maintenance on the equipment. The worker received his assignments from the owner

of the firm and he retained the right, if necessary to protect his business interest, to determine or change the method used by the worker in the performance of these assignments. The firm's members were contacted for resolution if problems or complaints arose as a result of the workers services. The worker submitted reports notating his time worked as well as the drill schedules. Due to the nature of the job, the workers schedule varied. Jobs were obtained by the firm and assigned to the worker by the firm. The worker provided his services at various locations specified by the firm. The worker was required to provide his service personally. If helper or substitutes were needed the firm hired and paid them. All of these facts indicate the firm's control over the services provided by the worker.

The firm provided the supplies, equipment and materials necessary for the worker to provide his services, while the worker provided his gloves. The worker did not lease any equipment and did not incur any expenses in the performance of his job. The customers paid the firm and the worker received remuneration in the form of an hourly wage. The firm did not offer benefits to the worker such as paid vacation or sick days and did not carry worker's compensation insurance on the worker. The worker did not have a financial investment in the firm and therefore could not realize a profit or incur a loss as a result of his services. The above factors point towards the firm's control over the financial aspects of the relationship.

There was no written agreement describing the relationship. The worker did not provide similar services for others while employed by this firm. The worker performed services in the firm's name. The worker did not advertise his services or hold himself out to the public as available to provide similar services, and did not keep a business listing. The worker's relationship with the firm was continuous as opposed to a single transaction. Both parties retained the right to terminate the relationship without incurring liability, and in fact, the relationship has ended. The above facts do not reflect a business presence for the worker, but rather reflect the firm's control over the worker's services.

LAW

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law."

Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. See Rev. Rul. 70-630, 1970-2 C.B. 229.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. See Rev. Rul. 74-389, 1974-2 C.B. 330.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. See Rev. Rul. 75-41, 1975-1 C.B. 323.

If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70-309, 1970-1 C.B. 199.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral controls, financial controls, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

TAX RAMIFICATIONS

Compensation to an individual classified as an employee is subject to Federal income tax withholding, Federal Insurance Contributions Act tax (FICA), and Federal Unemployment Tax Act (FUTA) tax as provided by sections 3101, 3301, and 3401 of the Internal Revenue Code, and it is possible you are liable for the same.

If your LLC elected to be treated as a partnership or a corporation, the LLC is responsible for these employment taxes.

If you are the sole member of the LLC and you have not made any election for treatment as a corporation, then the LLC is disregarded as an entity separate from you, the owner. This means the business is essentially treated as your sole proprietorship, and you are responsible for the employment taxes. If you chose to pay your worker under the LLC name and identification number, you have the option of filing the employment tax returns in this manner and IRS will process them. However, filing a return using the name and identification number of the disregarded entity does not make it liable for tax, even when the liability is the result of the business activities of the LLC entity. The disregarded status of your LLC means that you the owner, not the LLC,

are legally liable for employment taxes, and you are the employer of any employees engaged in the business activities of your LLC.

This determination is based on the application of law to the information presented to us and discovered by us during the course of our investigation; however, we are not in a position to personally judge the validity of the information submitted. This ruling pertains to all workers performing services under the same or similar circumstances. It is binding on the taxpayer to whom it is addressed; however, Section 6110(k)(3) of the Code provides it may not be used or cited as precedent.

Internal Revenue Code section 7436 concerns reclassifications of worker status that occur during IRS examinations. As this determination is not related to an IRS audit, it does not constitute a notice of determination under the provisions of section 7436, nor is this an audit for purposes of entitling you to section 530 relief (further explained below) if you are not otherwise eligible for such relief.

OPTIONS AND ASSISTANCE

The SS-8 Program does not calculate your balance due and send you a bill. You are responsible for satisfying the employment tax reporting, filing, and payment obligations that result from this determination, such as filing employment tax returns or adjusting previously filed employment tax returns. Your immediate handling of this correction and your prompt payment of the tax may reduce any related interest and penalties.

Section 530 of the 1978 Revenue Act established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. This is explained more fully in the enclosed fact sheet. It is important to note that this office does not have the authority to grant section 530 relief in relation to this determination. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should IRS select your return for audit. The SS-8 determination process is not related to an examination of your returns. There is also no procedure available to you by which you can request an audit for the purpose of addressing your eligibility for section 530 relief. You should contact a tax professional if you need assistance with this matter.

If you are not eligible for section 530 relief, and the failure to pay the correct amount of employment tax was due to the misclassification of a worker's status, you must use the rates outlined in section 3509 of the Code to calculate your liability.

IRC Section 3509(a) rates

The rates under IRC section 3509(a) total 10.68% of the wages paid up to the Social Security wage base for such year and 3.24% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 1.5 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the **employee's** share of the social security and Medicare taxes is 20 percent of the full rate (20% of 6.20%=1.24% of wages up to the Social Security wage base; 20% of 1.45%=.29% of the total wages, including wages in excess of the Social Security wage base).

- FICA Taxes - Your liability for the **employer's** share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

IRC Section 3509(b) rates

If you did not file required information returns (e.g., Form 1099-MISC) consistent with treating the worker as not being an employee, you must use the rates under IRC section 3509(b). They total 13.71% of the wages paid up to the Social Security wage base for such year and 5.03% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 3 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the employee's share of the social security and Medicare taxes is 40 percent of the full rate (40% of 6.20%=2.48% of wages up to the Social Security wage base; 40% of 1.45%=.58% of the total wages, including wages in excess of the Social Security wage base).

- FICA Taxes - Your liability for the employer's share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

Section 3509(c) provides that these rates do not apply in cases of intentional disregard of the requirement to deduct and withhold the tax, nor do section 3509 rates apply to taxes due on wages paid in any period within the current calendar year.

If you deem that the firm meets the criteria for section 530 relief as outlined in the enclosure, you do not have to file/adjust your employment tax returns to reflect this determination. Also, you may choose to reclassify this class of worker to employee status in accordance with this determination for future periods without jeopardizing your ability to claim section 530 relief for past periods.

If you need further assistance in filing/adjusting your employment tax returns due to the reclassification of your worker, please call the IRS help line at 1-800-829-4933. Call

1-866-455-7438 for assistance in preparing or correcting Forms W-2, W-3, 1099, 1096, or other information returns. If you have any questions concerning this determination, please feel free to contact the person whose name and number are listed at the top of this letter. Please refer to your case number ( ) when contacting us about this case.

Sincerely,

Operations Manager

Enclosures: Section 530 Fact Sheet
Notice of IRS Compliance Expectations
Notice 1155
Notice 441
Sanitized Determination Letter for Public Disclosure

* To order forms and publications, please call 1-800-TAX-FORM or visit us online at www.irs.gov/formspubs.

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